

COALITION FOR ONLINE ACCOUNTABILITY

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VIA E-MAIL ONLY – DNSTransition@ntia.doc.gov

Ms. Fiona M. Alexander
Associate Administrator
Office of International Affairs
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W., Room 4701
Washington, DC 20230

Re: NTIA Notice of Inquiry: Assessment of the Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System, 74 Fed. Reg. 18,688 (April 24, 2009)

Dear Ms. Alexander:

The Coalition for Online Accountability (COA) appreciates this opportunity to respond to the above-referenced Notice of Inquiry (NOI) issued by the National Telecommunications and Information Administration (NTIA) regarding the upcoming expiration of the Joint Project Agreement (JPA) between the Department of Commerce and the Internet Corporation for Assigned Names and Numbers (ICANN).

COA consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. These are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company. COA is a member of the Intellectual Property Constituency of ICANN's Generic Names

American Society of Composers
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Entertainment Software Association (ESA)

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Business Software Alliance (BSA)

Recording Industry Association of America (RIAA)

The Walt Disney Company

Counsel: Steven J. Metalitz (met@msk.com)

Supporting Organization (GNSO).¹ COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization. We have also worked closely with NTIA as it carries out its responsibilities under the JPA, most recently by submitting extensive written and oral presentations in conjunction with the mid-term review of the JPA that NTIA conducted in early 2008. See http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_081.PDF and http://www.ntia.doc.gov/ntiahome/frnotices/2008/ICANN_transcripts_080228.pdf.

Summary

COA continues to actively support the ICANN model as the best available means for carrying out the vital but limited tasks assigned to it. But in our February 2008 comments on the mid-term review, we concluded that “a number of the critical goals of the JPA have not been achieved.” (Emphasis in original.) Sixteen months later, we reiterate that conclusion.

Although ICANN continues to make significant progress toward it, it has not yet reached its goal: a private-sector led organization that acts with transparency, that is subject to strong and tested accountability mechanisms, and that carries out its mission through a comprehensive system of contractual agreements that are widely respected, fully implemented, and vigorously enforced. Primarily for this reason, the special relationship between NTIA and ICANN, as embodied in the JPA, should not end on September 30, 2009.

Instead, recognizing that the transition envisioned in the DNS White Paper will be a process, not a discrete event, NTIA and ICANN should commit to entering into a mutually agreed documentation of the next phase of their relationship. That agreement should document ICANN’s commitment to clear benchmarks and criteria that will institutionalize key features of the transition, especially in four areas:

- independent private-sector leadership in ICANN;
- a culture of compliance in ICANN’s relationships with its contracted parties;
- a more rational and predictable approach to transparency and the public comment process; and
- reaffirming that ICANN will remain a US not-for-profit corporation, headquartered in the US, and that any change in the JPA will not impact the IANA contract.

¹ COA’s counsel currently serves as president of that constituency. However, this submission is not made on behalf of the Intellectual Property Constituency.

1. The Significance of September 30, 2009

When the drafters of the JPA decided to limit its duration to three years, ending on September 30, 2009, they clearly did not anticipate the crossroads at which ICANN would find itself today, less than four months prior to that date. Among the major challenges ICANN now faces are:

- An historic initiative to open up the Internet to literally billions of new users around the world, through Internationalized Domain Names (IDNs) at the top level, is slated to culminate in Q4 of 2009 – which begins the day after the JPA expires -- through issuance of a final implementation plan for the first IDN country code Top Level Domains (ccTLDs).
- The final steps toward the rollout of a potentially unlimited number of new generic Top Level Domains – both IDN and ASCII-based – are also scheduled to be taken in Q4 2009, with release of the Final Applicant Guidebook – the complete ground rules for the new gTLD application, evaluation, and delegation process.
- ICANN's CEO will leave office on June 30, 2009, and the transition to new leadership will take place over the remainder of the calendar year.

All these help explain why September 30 would, in any event, be an inconvenient, disruptive, and potentially destabilizing date to make a dramatic change in ICANN's relationship with the US government. But beyond these factors, there is a more fundamental reason why this particular date, arbitrarily designated three years ago, should not be the occasion for such a watershed: the pre-requisites for a successful transition to the private sector, as marked out in the Affirmation of Responsibilities adopted by the ICANN board in 2006, simply have not been met. See

http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNBoardResolution_09252006.htm. In this regard, while there has certainly been more progress since the mid-term review, the overall picture has not changed sufficiently to justify a different conclusion than the one we reached in early 2008 and stated in our mid-term review comments: termination at this time of the relationship embodied in the JPA “would be viewed as an abdication of the U.S. government’s commitment to the basic principles of private sector leadership in the coordination of the Domain Name System, and as a compromise of the vision of DNS management based on the enforcement of voluntary contracts rather than on the fiat of one or more governments.”

2. What ICANN Must Do Before the Transition is Completed

COA is aware that a wide range of other organizations share our view that, while ultimately there should be a transition in the relationship between the U.S. government and ICANN, simply allowing the JPA to expire on September 30, 2009 would not be a constructive step toward that transition. In the remainder of this submission, COA offers its list of some of the

key challenges ICANN has yet to surmount. Many other commenters will no doubt present their own lists of steps – some overlapping with ours – that ICANN must take before transition would be justified.

In many respects, the following points call on ICANN to institutionalize, strengthen and make permanent trends that are already evident in the organization's more recent activities. While in some areas we think ICANN needs to change course, we are not calling for an about-face; and to a greater extent than was true at the time of the mid-term review, these points simply reflect the need for ICANN to broaden, pave and extend the route on which it has already begun to travel.

A. The Role of Global Business

In our mid-term review comments, we identified “one of the most critical” challenges facing ICANN before a successful transition: the need to establish “a reliable, consistent mechanism” through which “members of the independent business community – including but by no means limited to copyright and trademark owners – who are not in contractual relationships with ICANN” can gain “confidence that their voices will be heard and heeded when ICANN comes to make decisions that profoundly affect their businesses.” This remains the case today, as the new generic Top Level Domain process clearly demonstrates.

Over the past 16 months, much of ICANN’s bandwidth has been devoted to the launching of an initiative about which much of the business community has deep, long-held, and widely-expressed doubts: the rollout of perhaps hundreds or even thousands of new gTLDs. As these expressions of concern grew louder and more widespread, ICANN clearly heeded them – to some extent. Notably, ICANN created an “Implementation Recommendation Team” to propose concrete solutions to the problems with the new gTLD launch which had been identified by trademark owners; it provided invaluable support to the IRT’s efforts; and it has crafted a process designed to allow the IRT’s final recommendations, released on May 29, to be expeditiously considered for inclusion in the ground rules of the new gTLD launch. COA commends ICANN for its responsiveness in this area.

At the same time, ICANN has been much less responsive to what in some ways is an even more fundamental concern about the new gTLD process. Although ICANN relies heavily upon an “expanded competition” rationale to justify the entire new gTLD process, it has never conducted a serious and objective study to determine how the new gTLD launch should be fashioned to maximize the likelihood that enhanced competition and increased consumer choice will actually result. Indeed, there is considerable evidence to suggest that, because of the characteristics of the gTLD marketplace (especially the entrenched domination of .com), a new gTLD launch (at least in the ASCII TLD space) may do little to enhance choice and deliver value to consumers on the Internet. ICANN has identified “Demand and Economic Analysis” as one of the four “overarching issues” that need to be resolved before the new gTLD launch occurs; but even to the extent that this topic overlaps with the question of whether and how new gTLDs will

enhance competition, ICANN has yet to unveil any credible plan for addressing it. See https://st.icann.org/new-gtld-overarching-issues/index.cgi?tld_demand_and_economic_analysis.

Clearly, the new gTLD development process has been dominated up till now by those with a direct financial stake in as broad and unfocused a new gTLD launch as possible, including particularly the ICANN-accredited registrars who will be the only entities authorized to sponsor registrations in the new gTLDs (including lucrative defensive registrations to protect trademark interests), and the incumbent registry operators who will no doubt take the lion's share of the business of operating the new gTLD registries. In this regard, the new gTLD process is not fundamentally different from many other issues addressed by ICANN. Today's ICANN is "private-sector-led" only in the sense that these accredited registrars and registry operators are located in the private sector. But the vast majority of the private sector – what we refer to as the "independent business community" – has no contractual tie to ICANN. The independent business community depends increasingly upon a secure, stable and resilient Domain Name System in order to carry out electronic commerce and otherwise do business; but this sector remains marginalized within the ICANN decision-making process. For similar but somewhat different reasons, the same is true of the major civil society institutions and other non-profit organizations – including, notably, the representatives of consumer interests – who are also profoundly affected by ICANN decisions but have little viable means for influencing them.

ICANN has already identified the integration of the independent business community and major non-profit institutions as a problem, but has done very little to address it concretely. COA believes the following solutions, among others, should be considered for incorporation into the benchmarks to be included in the mutually agreed documentation of the future USG-ICANN relationship:

- Institutionalize an independent business role on the ICANN Board. The best way to ensure that ICANN does not make decisions without considering the interests of independent (non-contracted) businesses that depend on Internet security and stability is to restructure the ICANN Board to ensure substantial representation of those interests. The composition of ICANN's board of directors has rarely included more than a token business voice. While this restructuring could be accomplished in a number of ways, most of them will require a change in the way the ICANN currently populates the majority of its Board – through a "Nominating Committee" process that entirely lacks both transparency and accountability.
- Create an Independent Supervisory Board, with substantial representation from independent global business interests (not contracting parties with ICANN), with the power to review and recommend changes to major Board decisions that affect business. The jurisdiction and authority of the Supervisory Board should extend not only to ICANN's procedural compliance with its decision-making processes, but also to the substance of decisions. While clearly it would be preferable to prevent ICANN from making decisions that do not take business interests into account, a corrective mechanism such as the Supervisory Board may be the next best option.

B. Contract Compliance – and Improvement

COA's mid-term review comments focused extensively on the problem of lack of enforcement of ICANN's contracts with registrars and registries. As we stated then, "few concepts are more central to the success of the grand experiment in bottom-up, private-sector-led management of the domain name system (DNS) than is the demonstrated ability and readiness of ICANN to enforce its contracts." As of February 2008, we noted, "ICANN has literally just started to step up to this central responsibility." Sixteen months later, while we can report some progress, the overall picture is not much different. ICANN has expanded its compliance staff; it has revoked the accreditation of a few, mostly very small, registrars that have engaged in egregious violations of the Registrar Accreditation Agreement (RAA); and it has devoted more effort to publicizing its compliance activities. But ICANN remains far from establishing the "culture of compliance" that is essential for the "grand experiment" to succeed, or, to put it more modestly, to enable a successful transition to private sector control.

COA was pleased to read, in the ICANN draft framework budget and operating plan for next fiscal year, that "a key focus in FY10 will be asking the community to consider what contractual/policy tools are necessary to make compliance efforts even more effective and more cost efficient in the long term." See <http://www.icann.org/en/planning/ops-budget-framework-10-en.pdf>. But this is a question that ICANN should have been focusing on when the current JPA first came into force, or even before, rather than in the run-up to its expiration. Not only are ICANN's contracts with registrars inadequately enforced; the standards they ask registrars to live up to are far too weak to adequately protect the interests of registrants, intellectual property owners, or the public at large. Just last month, the ICANN Board finally gave its approval to a set of amendments to the RAA; but those amendments, while including some positive contributions, were accurately characterized by the Intellectual Property Constituency as "a significantly flawed product that would benefit from more dialogue and input from the business sector, from representatives of registrants, and from law enforcement, consumer groups and other representatives of the public interest." <http://forum.icann.org/lists/raa-consultation/msg00066.html>. Resistance from the IPC and others to the just-approved RAA amendments did lead to a commitment to consider another round of amendments in the near future. COA hopes that the next round will provide for input from copyright and trademark interests that were systematically excluded from the negotiating process last time, when the amendments were written behind closed doors by ICANN staff and registrar representatives alone.

In order to address these serious concerns about contract compliance and improvement, ICANN should commit now to specific steps to institutionalize the "culture of compliance" that is required, including making contract auditing and enforcement a greater priority in the organization's budget and corporate strategy, and upgrading the requirements imposed on registrars and registries in specific areas. One of these should be the public accessibility of registrant contact data through Whois services. A top goal should be to bring under control the wholly ungoverned system of proxy and private registration services, especially those run by accredited registrars and their agents and alter egos. These services need clear guidelines for

their operation, and those guidelines should be enforced, in a way that respect the vital needs of law enforcement, consumers, parents, intellectual property owners, and other Internet users for accurate and current contact information on domain name registrants.

COA reiterates, in the words of the mid-term review submission, that “ICANN’s slowness to deliver a credible contract compliance program is not simply one shortcoming to be weighed neutrally against areas where it has performed better..... If third parties who rely upon the terms of those contracts lack confidence that they will be enforced – if they come to expect that the failure of a contracting party to live up to an obligation of importance to third parties will not be investigated, will not be remedied, and will have no consequences – then the success of the entire experiment is at risk.”

C. Transparency and Responsiveness to Public Comments

COA’s mid-term review comments narrated how the ICANN way of doing business erected barriers to effective public participation in its decision-making processes. We cited features such as uncertain timelines, repetitive reviews, and the global peregrinations of ICANN’s thrice-yearly meeting venues as examples of procedures that render the organization effectively opaque to all but those (such as contracted parties) with a strong economic imperative to make the outsized investments necessary to keep up. We also stressed the particular frustrations that copyright and trademark owners experienced when their responses in public comments periods were effectively ignored. As in other areas, while ICANN can point to some progress since the mid-term review, the overall picture has not changed.

The public comment process, in particular, still desperately needs reform. COA participates actively in this process, devoting considerable time and resources to using this channel for input to the ICANN decision-making process. COA and all other public commenters need a much higher level of confidence that their input will be considered, listened to, and responded to by ICANN in a transparent and objective fashion. Thus, benchmarks in the mutually agreed documentation should address issues such as specific and workable guarantees of advance notice of proposals and all relevant supporting materials, giving adequate time for meaningful input by those affected; providing full analysis of public comments received and how they were incorporated into decisions; and making publicly available documentation of staff recommendations, consultants’ advice, legal input and other supporting material provided to the decision makers. Without adequate confidence in the public comment process, or the development of a more effective mechanism for inputting the views of affected members of the public about what ICANN proposes to do, any substantial alteration in the USG-ICANN relationship would be premature.

D. ICANN's Ties to the US and the USG

ICANN should take this opportunity to formalize its intention to remain a US not-for-profit corporation, subject to US law, and to categorically affirm that any change in the JPA will have no impact on the separate contract with the US government for fulfillment of the IANA functions that are at the core of the Internet naming and addressing systems. ICANN's long flirtation with the idea of establishing some sort of international legal personality, or one based on the laws of Switzerland, Belgium, or some other jurisdiction that accommodates international organizations of various kinds, has contributed directly to concerns about instability, since every contract ICANN has thus far executed with registrars and registries is intended to be subject to US law. The end of the current JPA term is an opportune time to dispel these concerns and to emphasize what is definitely NOT changing in the ICANN-USG relationship.

COA appreciates NTIA's consideration of our views. We stand ready to answer questions, provide further comments, and otherwise assist NTIA as it resolves the complex issues surrounding the next phase of its relationship with ICANN.

Respectfully submitted,

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